NO. 16340

IN THE

United States Court of Appeals

For the Ninth Circuit

STEVE WINN and EDITH WINN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Idaho, Southern Division.

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I

STATEMENT OF JURISDICTION

This action was brought by the United States of America for the taking of certain property belonging to appellant under the power of eminent domain and to determine just compensation to appellants. Jurisdiction is alleged in the Complaint to be based upon the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257) the Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258 (a)) and the

Federal Aid Highway Act of 1956 approved June 29, 1956 (70 Stat. 374), authorizing the acquisition of land or interest in land (including control of access thereto) for construction, reconstruction or improvements of the national system of interstate and defense highways. The appeal is authorized under 28 U.S.C.A. 1291, and Rule 73, Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

Appellant is the owner of 67 acres of desert land (66) approximately 8 miles (65) west of Mountain Home, Idaho. The present route of U.S. Highway 30 runs through the appellants' property and appellants have built a building adjoining the present highway on the south used as a rock shop where the appellants cut and polish rocks and sell them and other trinkets and souvenirs to the public. Appellants have a considerable investment in the property (68) and have made their livelihood operating the rock shop for the past five years (66). The present action was brought by appellee to condemn approximately 2.30 acres out of the northeast corner of appellant's land for the purpose of constructing a new interstate limited access highway (marked x on exhibit 1; see Transcript page 29). The new highway is roughly 2000 feet northeast of the present highway, and cuts off the present highway to the west of appellant's property in such a manner that there is no access to the new high-

way for 14 miles over a dirt road (31) to the west and only a probable access to the new highway 4.5 miles to the east (33-34). Appellants' property will have a frontage of 650 feet along the new highway but there will be no access permitted from appellants' property to the new highway (30) and plaintiff will be left stranded on the desert (66-70) with only an unkept dirt road leading to and from the rock shop toward Boise some 40 miles away or to Mountain Home about 8 miles away over the old highway a distance of approximately 4.8 miles where he may be able to get onto the new highway and proceed into Mountain Home.

The case was tried to a jury but the appellants were not permitted to put on any evidence concerning the value of appellants' entire property before the taking and the value of the remainder after the taking and the application of the property taken to the uses proposed by appellee. The trial court repeatedly advised the jury when ruling on admissability of evidence (55; 63) that the jury could consider only the value of the small acreage taken by the plaintiff-appellee and that they could not award defendants-appellants' anything for diminution in value of their remaining property by reason of the taking of the small tract and the cutting off of access to appellants' remaining property (44, 47, 50, 55, 63, 65).

In giving his formal instructions to the jury the trial court instructed the jury that they were to award the fair cash value "for the property

taken" (78) but the court had repeatedly advised the jury while ruling on evidence that plaintiff was taking only 2.30 acres of bare land and that they could award damages for nothing more (55, 63).

The jury returned a verdict of $100.00 (21) that being the amount appellee's witness fixed as the fair market value of the 2.30 acres of land actually taken (41). This is an appeal from the verdict and judgment entered thereon.

SPECIFICATIONS OF ERROR

1. The court erred in advising the jury that the diminution in value of appellants' business property by reason of the destruction of business access to appellants' property could not be considered by the jury in fixing amount of damage suffered by appellants. (44, 47, 50)

2. The court erred in advising and instructing the jury that appellants' damages must be limited to the market value of the land taken by appellee without regard to any diminution in value of appellants' remaining property by reason of the taking of a part of it by appellee. (50, 55-56)

3. The court erred in advising the jury that because appellee is not obligated to build a new access way to appellants' property, appellee is not obligated to pay for appellants' access way taken or destroyed by it. (55, 59, 63)

4. The court erred in excluding the appellants' evidence of the fair market value of appellants' property immediately before the taking and the

fair market value of the property remaining after the taking of part of it by appellee on appellees objection that such evidence was incompetent, irrelevant and immaterial and not a proper basis upon which an award could be made. (63)

5. The court erred in excluding appellant Steve Winn's testimony concerning value of his property after access to it is disrupted by the construction of the new highway on appellee's objection that such testimony was immaterial, that no foundation laid for it and that it was beyond the scope of the trial. (68-69)

Likewise it was error to sustain the objection on grounds of immateriality to the question propounded to Steve Winn, appellant, "In your opinion would you be able to continue business after the highway is built and your access is destroyed?" (68)

6. The court erred in sustaining the objection made by appellee to the question as to the market value of the Winn property as it was just prior to June 13, 1958 (the day of taking) asked of Emett Newel, real estate appraiser (55). The objection being "that it covers issues beyond the scope of this trial." (55)

7. The court also erred in granting the motion to strike (63) the witness Newel's testimony of market value of appellants' property prior to the taking (58) and the market value of the property remaining after the taking by reason of disruption of ac-

cess to his property (bottom of p 59), said motion to strike being on the ground "that the opinion of this witness . . . being incompetent, irrelevant and immaterial and not being a proper basis upon which an award of damage can be made." (63)

8. The court erred in sustaining the objection (70) to the offer of proof by the witness Steve Winn, appellant as to the value of his business property after the disruption of access thereto by construction of the new highway (69). The objection being that the offered evidence was immaterial, no foundation and that it was far beyond the scope of the trial. (69)

9. The court erred in instructing the jury that the rule that an abutting owner's right of access cannot be taken or materially interfered with in eminent domain proceedings without payment of just compensation does not apply to the new highway, for construction of which appellants' land and right of access was taken. (74)

10. The court erred in refusing to instruct the jury that the measure of damages to be awarded to the defendants Steve Winn and Edith Winn is the difference in market value of their property before the taking of any of it by the appellee as compared to the market value of said property after the contemplated new highway is built. (Requested Instruction No. 1, p 16)

11. The court erred in refusing to instruct the jury that all the loss or damage to the appellants

reasonably occurring by the taking must be assessed in one proceeding and that the damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of defendants' property and from the use to which the State purposes to put the property taken. (Requested Instruction No. 2. p 16)

12. The court erred in refusing to instruct the jury that in determining market value of the defendants' (appellants') property as of the date of the issuance of summons and in determining market value of the property remaining after the taking, the jury must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the plaintiff (appellee) has been taken and put to the use proposed by the plaintiff and that they should determine the difference between the value before and the value after the taking in determining the amount of their verdict. (Requested Instruction No. 4, p 17)

13. The Court erred in refusing to instruct the jury that in determining the value of defendants' (appellants') property after the taking of a part of it by plaintiff (appellee) the jury should consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have upon the market value of defendants' (appellants') remaining property. (Requested Instruction No. 5 p 17)

IV

ARGUMENT

It is well established law both in the State and Federal Courts that where only a part of a tract of land is taken in the exercise of the power of eminent domain the owner is entitled to recover not only for the part taken but also for the injuries to the residue of the property caused by the taking of part of it and the application of the part taken to the use proposed by the taker.

United States v. Grizzard, 219 U.S. 180, 55 L. Ed. 165, 31 S. Ct. 162; Stevenson Brick Company v. United States ex rel Tennessee Valley Authority (C.C.A. Ala.) 110 F (2d) 360; Puget Sound Power and Light Company v. City of Puyallup (C.C.A. Wash) 51 F (2d) 688; City of Lewiston v. Brinton, 41 Ida. 317, 239 P. 738.

It was therefore error for the Court to sustain the objections to the evidence offered by appellants to show the damage to appellants' remaining property and the effect of taking of his right of business access from the rock shop to the highway (43, 55, 63, 65, 68, 69-70, 71) and it was likewise error to refuse appellants' requested instruction on the true measure of damages (appellants' requested instruction No. 1, 2, 3, 4 and 5, pages 16 and 17).

It was likewise prejudicial error for the Court in the presence of the jury to make the following erroneous statement of the law:

"So as to make this clear to you I will say

that the amount of damage that will be allowed will be the value of this tract of land that is being taken *without regard to the fact that the freeway is being built.* In other words, the Court cannot allow you any damages because the road is being built farther away from the defendant's property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he had sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the Government to build an access road from the highway to his property. So the only thing I can submit to this jury is the value of this tract of land cut off from this place, what damage it does to the place, this small tract from the outside corner. I think I have made that clear." (56) (emphasis added)

Apparently the Court was acting under the misconception that because appellee cannot be compelled to permit appellants' access from the new highway to his shop that appellee is not liable for destruction of the business access presently enjoyed by appellants. (55, 59, 63) The Court considered

the 2.30 acres taken as though it was an area entirely removed from appellants' remaining property (47) and refused to permit the jury to consider that the manner in which appellee intended to use the property taken would greatly depreciate the value of appellants' remaining property (46-47, 50, 84, 86). One of appellee's witnesses repeatedly referred to the "unity of use rule" as a justification for his disregard of the value of appellants' rock shop (44) and the Court seems to have adopted that witness's theory. As we understand the unity of use doctrine it is simply that if one of separate tracts of land is taken which is not put to the same use as the tracts not taken the remaining tracts cannot be considered *as one parcel* in determining the amount of damages to the land not taken (Atkison, T. and S. F. Ry. Company v. Southern Pacific Company (Cal. App.) 57 P (2d) 575, 583. In other words, if, for example, the appellants' rock shop had been taken, appellants would not thereby be entitled to treat the entire 67 acres owned by them as commercial property in determining the damages to the remainder unless it could be shown that the entire 67 acres was used as an integral part of the rock shop (Stevenson Brick Company v. United States, ex rel Tennessee Valley authority (C.C.A. Ala.) 110 F (2d) 360.) Certainly the unity of use rule does not mean that because the 2.30 acres of land being taken was used by appellants for a different purpose than the rock shop that the appellants are not entitled to any sever-

ance damage to the property remaining. The unity of use doctrine has no application to the facts of this case.

The law recognizes the necessity for payment of compensation for all property and property rights taken.

> "For the purposes of these cases it is immaterial whether the Government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee or only destroyed the tenant's right of occupancy. If any property is taken compensation is required."
> —United States v. Petty Motor Company, 327 U.S. 372, 90 L. Ed. 729.

The case of the United States v. Grizzard, 219 U.S. 180, 55 L. Ed. 165, 31 S. Ct. 162 is a case quite similar in many respects to the case at bar. In that case the owners of a farm brought action to recover for damages because of a flooding of part of their farm and destruction of access to the remaining part.

The plaintiff's farm lay on Tates Creek, a tributary of the Kentucky River. For the purpose of improving the navigation of that stream the Government erected a series of locks and dams. As a consequence, the waters of Tates Creek were backed up to such an extent as to flood 7½ acres of the Grizzard farm. The flooding also cut off the access of the farm to the County road; the road having been flooded by the dams and locks. The trial court

allowed damages both for the 7½ acres of land actually taken and also for the loss of access from the County road to the farm. The Government appealed, not questioning respondent's right to damages for the 7½ acres of land taken, but contending that no damages could be allowed for loss of access. On an appeal to the Supreme Court of the United States the Court stated:

> "The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole, by flooding—a manner of appropriating which has made the village market, church, and school so inconvenient of access as to add some three miles of travel by an unimproved and roundabout County road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.
>
> ******
>
> "The constitutional limitation upon the power of eminent domain possessed by the United States is that 'private property shall not be taken for public use without just compensation.' The just compensation thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking

of a part of a partial, or single tract of land shall be measured by the loss resulting to him from the appropriation. If, as the Court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains.

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"That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was $1,500.00 when the value of the entire place before the taking was $3,000.00. A judgment for a less sum will not be that 'just compensation' to which the defendants are entitled. The case is not different in legal consequences from what it would have been if a railway had been constructed across one lawn, cutting the owner off from his road and outbuildings, etc. *To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the deprecation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.*" (emphasis added)

The question then is whether appellants had property or property rights other than the 2.30 acres of land which were taken by appellee in the condemnation suit.

This question is answered by the case of United States v. Grizzard, supra. For here as in that case a small acreage of land was taken and the manner to which the use of the property taken was applied greatly interfered with, if not destroyed, the owners' and the public's access to the property remaining after the taking, and as in that case we can say:

> "To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken and the use to which it was put, would be a travesty upon justice."

That one having property abutting on a highway has a property right distinct from that of the general public in his free access to the abutting street is now firmly established in the law of Idaho:

> "***There is testimony that the new highway when constructed could, in the vicinity of appellant's plant, only be entered at certain points. Convenience of access to a highway, formerly enjoyed by appellant, and impaired by reason of the new construction, could be considered by the jury with other testimony

in fixing the amount of damages sustained. 29 C.J.S., Eminent Domain, Sec. 163. p 1033" —State v. Dunclick, Inc. 77 Ida. 45, 286 P (2d) 1112

"Our review of Idaho's constitution, statutes and decisions clearly shows that the power of Eminent Domain extends to every kind of property taken for public use, including the right of access to public streets, such being an estate or interest in and appurtenant to real property; and since such right of access constitutes an interest in, by virtue of being an easement appurtenant to, a larger parcel, the court, jury or referee must ascertain and assess the damages which will accrue to the portion not sought to be condemned by reason of the severence of the portion—the right of access—sought to be condemned, and the construction of the improvement. I.C. Sec. 7-711.

"We therefore hold that the appellants' allegedly destroyed right of business access to their business property, if such be proven, constituted a taking of their property, whether or not accompanied by a taking of physical property, and constituted an element of damage, as does also any element of alleged taking of their physical property, which must be ascertained and assessed in accordance with the legislative mandate of I.C. Sec. 7-711."

—Hughes v. State, —Ida—, 329 P (2d) 397

The new Federal rule 71 A of the Federal rules

of Civil Procedure effective August 1, 1951 established a uniform procedure in Eminent Domain cases in the Federal Courts but the rule requires the Federal Court to determine what constitutes a property interest for which compensation must be made by reference to local law. United States v. Smoot Sand & Gravel Corporation (C.A. 4th) 248 F (2d) 822.

See also United States v. 247 Acres of land (D.C. Pa.) 104 F. Supp. 938 where it is said:

> "This Court in condemnation proceedings, must necessarily be guided by the practice and proceedings existing at the time in like cases in the Courts of the State in which the condemnation was affected. Federal rules of Civ. Proc. rule 71 A, 28 U.S.C.A."

Even prior to the adoption of rule 71 A of the rules of civil procedure the Supreme Court of the United States had held that:

> "The meaning of 'property' as used in the fifth Amendment, prohibiting the taking of property without payment of just compensation is a 'Federal question' but it will normally obtain its content by reference to local law."
> —United States v. Causby, 66 S. Ct. 1062, 328 U.S. 256, 90 L. Ed. 1206.

As a matter of fact the Supreme Court of the United States and most State Courts which have considered the question have held that the right of

ingress and egress to and from property abutting on a public street or highway is a valuable property right which cannot be taken or materially impaired in an eminent domain proceeding without payment of just compensation therefor. In addition to the case of United States v. Grizzard, 219 U.S. 180, 55 L. Ed. 165 and the Supreme Court of Idaho cases quoted earlier in this brief we refer the Court to the following cases in point:

Chicago v. Taylor, 125 U.S. 161, 31 L. Ed. 638, 8 S. Ct. 820, was a case in which Taylor brought an action to recover for damages to his property by construction of a viaduct on a street abutting on his property. The plaintiff's property consisted of a lot used as a coal yard and there was evidence that the construction of the viaduct greatly obstructed and in some points practically cut off access onto the coal yard from the street and that it was necessary to approach the coal yard from Lumber Street at the far end of the lot.

Judgment was for the plaintiff and on appeal the Supreme Court of the United States affirmed the decision and approved the following instruction given by the trial court.

> "The real question is, has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good

a price for other purposes, except that if the proof satisfies you that any of the particular business which has been heretofore carried on there and for which it was improved, have been impaired in value, or are not worth as much after his viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged the plaintiff would be entitled to recover for such damage to the improvements—that is to say, this lot being improved for a special purpose, if the proof satisfies you that it can no longer be rented or used for that purpose and that thereby these improvements have been lost or impaired in value, then the impairment to the value of these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage."

The United States Supreme Court then reviewed the many Illinois decisions under the Illinois constitutional provision for "payment" of compensation for taking or damaging of property by the State and held that the rule announced in Chicago & W. I. R. Company v. Ayres, 106 Illinois 518 as follows, was the rule that must be applied:

"It is needless to say our decisions have not been harmonious on this question but in the case of Rigney v. Chicago 102 Illinois 64 there was a full review of the decisions of our

Courts, as well as the Courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using improvement that is public in character—that it does not require that the damage shall be caused by trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question."

The Supreme Court of the United States then went on to say:

"Our attention has not been called to nor are we aware of any subsequent decision of the State Court giving the Constitution of 1870 an interpretation different from that indicated in Rigney v. Chicago and Chicago and W.I.R. Company v. Ayres. We concur in that interpretation. The use of the word "damage" in the clause provided for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State Court."

The case of Department of Public Works v. Wolf

(Ill.) 111 N E(2) 322 ~~N E (2d) 322~~, stated the rule as follows:

> "The right of access, ingress and egress condemned by this petition are valuable property rights and cannot be taken away or materially impaired without just compensation. (Citing cases) This rule applies not only in Illinois but is generally recognized to be the law throughout the United States. 39 C.J.S. Highway Section 141, page 1081. Moreover the Freeway's Act in the Section under which this proceeding is brought, Ill. Rev. Stat. 1951 Chapter 121, par. 336, specifically recognizes an abutting property owner right of access, ingres or egress as property rights which may be extinguished only by purchase or condemnation. It thus recognizes the right as being of value, and that the taking thereof must be compensated.
>
> We do not hold, of course, that there may never be circumstances which would justify a jury in finding that particular easement or without value. But such a verdict must be based upon admissable evidence and proper instructions."

In the case of Re Appropriation of Easement (Ohio App.) 112 N E (2d) 411 it is stated:

> "It is fundamental that the owner of land possesses an easement of access to the abutting highway at any and all points included within

his frontage on such highway until such easement is extinguished by proper legal process. When such easement is to be extinguished, the owner is entitled to reasonable compensation, just as he is when land is actually taken. While the convenience of through or vehicular traffic and the safety of travelers along the highway merits substantial consideration, the serving of these purposes cannot be dignified to the extent of defeating the rights of the landowner without his being compensated. Ease and facility of access constitutes valuable property rights for which the owner is entitled to be adequately compensated. While the interest of the general public are to be considered as dominant, it does not follow that such circumstances can operate to deny a substantial right of the property owner. The principle is recognized by legislative provision and holdings of the Court. Section 1178-21, General Code. The duty of fully protecting the rights of the property owner in the instance where a limited access highway is created is emphasized in Burnquist, Atty. Gen. v. Cook, 220 Minn. 48, 19 N W (2d) 394."

It is said in the case of Brown v. Board of Supervisors (Cal.) 57 P. 82 at 83:

"The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights, he is entitled to

compensation. The right is peculiar and individual to the abutting owner, differing from the right of passing to and fro on the street, which he enjoys in common with the public and any infringement thereof gives him a right of action. (Cases omitted). The right which the abutting owner has to the use of the street fronting upon his lot is defined to be an easement therein for the purposes of ingress and egress which attaches to the lot and in which he has a right of property as fully as that which he has in the lot itself, and any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision, for which he is entitled to compensation . . .

"The question of damage to the right of access does not depend on the location of the obstruction strictly on the owners property line, or upon total destruction of the owners means of access into the street proper.

"It is the opinion of this court that in every case involving an abutting owner's right in the street fronting his property the questions are whether or not his property has suffered a damage peculiar to itself over and above or different from that suffered by the public generally; what constitutes a damage peculiar to the property itself; and what the amount of

compensation therefor shall be; we hold that all of these questions of fact to be ascertained by the jury or the trial court."

In Bacich v. Board of Control of California (Cal) 144 P (2d) 818, the California Supreme Court makes an extensive analysis of the cases concerning the taking in eminent domain proceedings of the right of access of an abutting owner. That was a case involving the construction of the approach to the San Francisco Bay Bridge which resulted in lowering of Harrison Street in San Francisco by approximately 50 feet leaving as the only access to appellant's property an almost perpendicular flight of steps. A demurrer to plaintiff's Complaint was sustained but reversed on appeal. The Court stating at page 823 of the Pacific Report:

"It has long been recognized in this State and elsewhere that an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compenstation must be given for an impairment. We are not inclined to question or disturb that rule (citing many cases) The precise origin

of that property right is somewhat obscure but it may be said generally to have arisen by court decisions declaring that such right existed and recognizing it. See Am. Jur. Eminent Domain, Section 181; 41 Yale Law Journal 221. For that reason in the determination of the extent and character of that right most of the cases rely, without discussion, upon precedents which fit, or are analogous to the circumstances present in the case before the Court.

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"Manifestly, the addition to the Eminent Domain clause in Constitutions in most states, including California, of 'or damage' to the word 'taken' indicates an intent to extend that policy to embrace additional situations. On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased costs. (citing cases) However, it is said that in spite of that so called policy 'the Courts cannot ignore the sound and settled principles of law safeguarding the rights and property of individuals. (This improvement) may be of great convenience to the public generally, but the properties of abutting owners ought not to be sacrificed in order to secure it'; and, quoting from Sedgewick on Constitutional Law: 'The tendency under our system is too often to sacrifice the individual to the community;

> and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. ****' Liddick v City of Council Bluffs, Iowa, 5 N W. (2d) 361, 372, 382."

Idaho like California requires that payment be made not only for property "taken" but also for property "damaged." See Section 7-711, Idaho Code.

Boxberger v. State Highway Commission (Colo.) 251 P (2d) 920 discussed the question of how to determine damages for loss of access and there the Court said:

> 'It would seem difficult to establish the true or market value of access rights since they are not a commodity dealt in on a buying and selling market; however, the right of ingress and egress to and from a person's property adds or detracts from the property value and it would seem that the true value of such rights could only be found in the difference between the value of the land and its use for any and all kinds of purposes before the disturbance or destruction of such rights, and the value of the land minus any access or disturbed or inconvenient access to the highway.'

In Stock v. Cox, (Conn.) 6 A. (2d) 346 the Court said:

> "The rule of damages for a taking in the

usual case of this nature is 'the difference between the market value of the whole tract as it lay before the taking and the market value of what remains of it thereafter and after the completion of the public improvement. (Citing cases). The use to be made of the land taken is necessarily a factor to be considered in the application of this rule. The finding is that upon completion of the parkway the plaintiff will be deprived of the access across the land taken between his north and south tracts which he had previously enjoyed, and that insofar as his south tract is concerned the condemnation will prevent his right of access to an existing public highway. This destruction of the plaintiff's right of access to his south tract constitutes a taking of it in the constitutional sense. 18 Am. Jur. 789, Sec. 158; United States v. Welch, 217 U.S. 333, 338, 30 S. Ct. 527, 54 L. Ed. 787, 28 LRA (NS) 485, 18 Am. Jur. 814, Sec. 183, and 756, Sec. 132. This taking goes beyond an award for consequential damages to the plaintiff's remaining property by the taking of the center segment, which could be awarded on an appeal from the assessment of damages therefor, pursuant to the rule in the Gaylord case above recited. It constitutes rather a confiscation of the plaintiff's remaining land, for the direct taking of which the commissioner has assessed no damages. Against this the plaintiff is entitled to injunctive relief."

The measure of damages under the facts of this case, as is apparent from the foregoing cases, is the difference between the market value of appellants' entire tract of land as it lay before the taking and the market value of what remains after the taking and after completion of the new highway. Thus it was essential to appellants' case that the nature of the proposed public improvement and its effect on the market value of appellants' remaining property be considered by the jury under proper instructions of the Court. Chicago v. Taylor 125 U.S. 161, 31 L. Ed. 638, 8 S. Ct. 820; United States v. Petty Motor Company, 327 U.S. 372, 90 L. Ed. 729.

The trial court in the case at bar repeatedly advised the jury during the course of the trial in effect that the Government (appellee) was liable to appellants only for the 2.30 acres taken:

> "The Court: This is a very simple matter to clear up—*not taking into consideration any highway construction there* or anything of that nature, and taking the whole property, what would you say the value of the property *was lessened by the taking of this small tract of land,* and you have already answered that as One Hundred Dollars. I don't see there is anything more for him to answer." (emphasis added) (Transcript p. 50-51)

> "The Court: So as to make this clear to you I will say that the amount of damage that will be allowed will be the value of this tract of

land that is being taken *without regard to the fact that the freeway is being built.* In other words, the Court cannot allow you any damages because the road is being built further away from the defendants' property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he has sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the Government to build an access road from the highway to his property. *So the only thing I can submit to this jury is the value of this tract of land cut off from this place,* what damage it does to the place, this small tract from the outside corner. I think I have made that clear." (transcript p. 55-56) (emphasis added)

See also the Court's remarks at pages 43, 44, 47, 48, 59, 63 and 68 of the transcript.

And although appellants requested proper instructions on the measure of damages, the Court failed to advise the jury of any measure of damages to be applied in the case. The only instruction given on the measure of damages was the one re-

ported on the bottom of page 77 and continuing on page 78 of the transcript. There the jury was told in effect that the owner should receive "as compensation for the taking the value of the property for the use for which it is most valuable." But the Court then referred to the property as "the property sought to be condemned" which the Court had repeatedly told the jury during the course of trial consisted of 2.30 acres of bare land, even though the Complaint alleges (4) that appellees were intending to take "fee simple title *** together with all existing, future, or potential common law or statutory abutters' rights or easements of access to, from, and between said land and the abutting land of all parties having interest in said land." The Court gave appellants requested instruction No. 2 (16) but added a paragraph to it (74) which, to say the least, left the instruction so ambiguous as to be meaningless.

Thus the jury retired to deliberate the case with no evidence of the value of appellants' property prior to the time of the taking and no evidence of the value of the property after the taking and the construction of the highway as proposed by appellee. Moreover they had no clear formal instructions on the measure of damages. All the jury had to guide them as to the law was the Court's remarks during the trial that the only thing for the jury to consider "is the value of his tract of land cut off from this place" (55) and that "so as to make this clear to you I will say that the amount of damage that will

be allowed will be the value of this tract of land that is being taken without regard to the fact that the freeway is being built." (55) etc.

The only evidence of value permitted to stand in the record was the testimony of appellee's appraiser that the appellants' only damage was the loss of the 2.30 acres of sagebrush land valued at $100.00 (41) and the Court strongly indicated to the jury that he was in accord with that appraisal (50-51). It is no wonder then that the jury returned a verdict for $100.00 and gave no consideration to the destruction of appellants' business by reason of the taking away of the business access to his property.

We submit that the case should be reversed and a new trial ordered, whereat the jury are permitted to hear evidence of the difference in value of appellants' property before the taking of the 2.30 acres and after the taking of said small tract and the cutting off of access from the highway to appellant's remaining property by construction of the highway, and are permitted to determine the case under proper instructions covering all issues involved.

Respectfully Submitted

CLEMONS, SKILES & GREEN
JEPPESEN & JEPPESEN

By_____
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APPENDIX I.

Exhibit	Identified	Offered	Received	Rejected
Plf's No 1	27	29	29	
Plf's No 2	36	36	36	
Plf's No 3	38	39	39	
Plf's No 4	39	39	39	